* Together with:
Call v. United States

CARD 1

No. 723

REME COURT. U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. 710

WILLIAM TRAVIS BLACKBURN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

NO. _____

WILLIAM TRAVIS BLACKBURN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, William Travis Blackburn, prays that a Writ of Certiorari issue to the United States Court of Appeals

for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in the Office of the Clerk of said Court of Appeals on October 4, 1968. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Was the court in error in failing to direct a verdict of acquittal at the close of all the evidence?

2. Were the rights of petitioner Blackburn prejudiced by the remarks of the court as contained in the transcript page 45, beginning with line 11 and continuing through line 25, and that portion of page 46 of the transcript commencing with line 1 and extending through line 8?

3. Were the rights of petitioner Blackburn prejudiced by the examination of one Jimmy Lee Martin in the presence of the jury as set forth on page 88 of the transcript beginning with line 12 and running through line 25, entire page of page 89, and line 1 of page 90?

4. Did the argument of the United States Attorney as set forth on page 202 of the transcript, beginning with line 16 and running through line 25 and page 203 of the transcript beginning with line 1 and running through line 6, and also page 205 of the transcript beginning with line 10 and running through line 24 prejudice the rights of the petitioner?

5.(A) Did the United States Court of Appeals for the Fourth Circuit deprive the petitioner of his constitutional rights in denying oral argument to counsel for petitioner before reaching a final determination of the merits of the case of petitioner before said court?

(B) The United States Court of Appeals for the Fourth Circuit did violate Rule 19, sub-section (b), United States Supreme Court Rules, in that it did so far depart from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States.

18 U.S.C. 371.

Rule 39, sub-section (d) of Rules of Criminal Procedure.

United States Supreme Court Rule 19.

Rule 15 of the United States Court of Appeals, Fourth Circuit.

STATEMENT OF THE CASE

William Travis Blackburn, along with Isaac Call, was indicted in the United States District Court for the Middle District of North Carolina in Wilkesboro for a conspiracy to violate the laws of the United States relating to distilled spirits, in violation of 18 U.S.C. 371, allegedly occurring during a period of time from May, 1967, to and including July 26, 1967. A plea of not guilty was entered.

Testimony was presented by the Government through one John Dale Brooks, named as a co-conspirator but not

indicted, and he tesitified that during the latter part of May, 1967, Isaac Call, co-defendant, contacted him, John Dale Brooks, at his home in Alleghany County, Middle District of North Carolina, and proposed to furnish equipment and supplies to John Dale Brooks to set up and operate illicit distilleries. That no agreement was reached at that time, and subsequently Isaac Call contacted him again and that thereafter Isaac Call contacted him again, and that thereafter Isaac Call caused to be delivered to him stills, sugar, and distilling apparatus and equipment, and Isaac Call stated to John Dale Brooks that he would subsequently be contacted by William Travis Blackburn.

The bill of indictment states further that on July 8, 1967, William Travis Blackburn and one Jimmy Lee Martin, named as co-conspirator but not named in bill of indictment, contacted John Dale Brooks and picked up a load of non-tax-paid whiskey The testimony of John Dale Brooks was materially different. There was additional testimony on behalf of the United States Government, the other witnesses being agents of the Alcohol and Tobacco Tax Division, to the effect that various vehicles bearing illicit spirits were convoyed by the defendants William Travis Blackburn and Isaac Call, although no vehicle at any time being operated by Blackburn was seized and found to contain illicit whiskey. There was testimony offered by the Government that a 1961 Volvo sedan was seized and that same contained non-tax-paid spirits, in the vicinity of Farmington, North Carolina, but no evidence that this particular 1961 Volvo sedan was loaded with illicit spirits at or near the distillery located in Alleghany County near the home of John Dale Brooks. There was evidence that an unregistered distillery located near the home of one Andy Brooks in Alleghany County, North Carolina, was

destroyed by the agents of the Alcohol and Tobacco Tax Division in the latter part of July, 1967. Andy Brooks is the father of John Dale Brooks.

At the close of the foregoing evidence a motion for judgment of acquittal was made on behalf of Blackburn which was overruled. The case was submitted to the jury and a verdict of guilty was rendered, and the petitioner was sentenced to the custody of the Attorney General for a period of forty (40) months, and in addition thereto a fine of $1,000.00 was imposed.

In apt time a notice of appeal was taken to the United States Court of Appeals for the Fourth Circuit, and a brief was filed. Subsequently counsel for the petitioner was advised that this case was set for oral argument in Richmond, Virginia, before said Circuit Court for October 9, 1968. Subsequent thereto said court notified petitioner through his counsel of record that the court was denying petitioner, through counsel, the right of oral argument. Then on October 4, 1968, the United States Court of Appeals, Fourth Circuit, affirmed petitioner's conviction in the District Court.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code, 18 U.S.C. 371, etc. This was the basis for Federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of

the United States and other Federal Circuit Courts, and is specifically in conflict with the following decisions:

1. Fletcher v United States, 118 App DC 137, 332 F2d 724.
2. San Fratello v United States, 340 F2d 560, reh den 343 F2d 711.
3. Viereck v United States, 318 U.S. 236.
4. Anderson v Nelson, 20 L ed 2d 81.
5. Griffin v California, 380 U.S. 609.
6. Coppedge v United States, 369 U.S. 438.
7. Small v Robbins, 386 U.S. 1033.
8. United States Supreme Court Rule 19.
9. Rules of Criminal Procedure, Rule 39, sub-section (d).
10. Rule 15 of the United States Court of Appeals, Fourth Circuit.
11. Constitution of the United States.

In the case at bar the trial court submitted the case to the jury on evidence which was very contradictory, such as contained in the transcript, page 52:

"Q. And did Mr. Blackburn or Mr. Call come up there at that time before you set the stills up?

A. No, sir.

Q. They did not? Did you set the still up or the stills up?

A. Yes, sir."

At other places in the testimony of the witness for the Government, John Dale Brooks, he states that after he run whiskey off Mr. Blackburn came up to his place about two

weeks after he had run the liquor off. Apparently the whiskey was loaded in a black foreign car and the witness never identified it as a Volvo which is mentioned in the testimony of the other witnesses. We do not find in the transcript of the evidence where there was testimony that the whiskey or material loaded onto the black foreign car had come from a distillery that was unregistered. Neither is there evidence that the Volvo car upon which 121 gallons of whiskey was loaded, and seized at Farmington, came from the distillery operated by Brooks in Alleghany County, North Carolina.

Petitioner contends that the United States failed to properly show that the defendant Blackburn and his co-defendant Call were acting in unison and concert and conspiring together to violate the Internal Revenue laws.

In regard to the second question, your petitioner earnestly contends that the Court did prejudice the rights of this petitioner when it did admonish, in the presence of the jury, counsel for co-defendant Call as set forth in the transcript, page 45, lines 11 through 25, and page 46, lines 1 through 8. The Court concluded its admonishment to counsel for Call by saying: "Are you serious about that?" Petitioner contends that such remark did tend to demean the defendant Call and co-defendant Blackburn in the eyes of the jury.

Petitioner contends that it was prejudicial for the Government to examine prospective witness Jimmy Lee Martin as set forth on page 88 of the transcript, beginning with line 12 and extending through line 25, page 89, and line 1 of page 90.

As reflected in this testimony Jimmy Lee Martin was called around to testify on behalf of the Government, and in

the presence of the jury refused to take the witness stand, with the Court insisting three or four times that the witness come around and take the oath, which Martin refused to do, and finally after counsel for your petitioner had suggested to the District Attorney that the jury be excused the jury was excused, after which the witness Martin was held in contempt of court for refusing to testify.

Previously the Government witness, John Dale Brooks, had testified (transcript page 59, lines 15 through 24) that the defendant Blackburn allegedly made the statement to Brooks that the witness Jimmy Lee Martin was working with the ATU men, and "* * *I'll get him to come up here to get some whiskey and you can kill him."

FLETCHER v U.S., 118 App DC 137, 332 F2d 724.

"Calling alleged accomplice of defendant charged with robbery of taxicab driver, and asking him questions which he refused to answer on grounds that answer might incriminate him, unfairly prejudiced defendant because inferences from refusals to answer added critical weight to prosecution's case in form which was not subject to cross-examination, *** although trial court instructed jury to draw no inferences of guilt from witness' refusals, it added that witness' exercise of his constitutional right 'does not mean by itself, of course, that this defendant is guilty,' and thus jurors might have understood statement to mean that refusals might be considered along with other evidence as proof of defendant's guilt." (Quoted from ALR 2d Later Case Service, Vol. 6, page 658; supplementing ALR 2d 1443-1456.)

SAN FRATELLO v. U.S., (CA5 Fla.) 340 F2d 560, reh den 343 F2d 711.

This case held that:

"Facts showed prejudicial error in calling defendant's wife as witness so as to require her to claim her privilege against self-incrimination in presence of jury, although she had claimed privilege in previous trial and had advised prosecutor she would assert it in this case. Instruction to jury in connection with matter did not render error harmless." (Quoted from ALR 2d Later Case Service, Vol. 6, page 658; supplementing ALR 2d 1443-1456).

The court will bear in mind that the witness Jimmy Lee Martin is first mentioned in the bill of indictment as a co-conspirator although not named as a defendant in the bill of indictment. The co-conspirator is mentioned repeatedly in the testimony presented by the United States.

Petitioner vigorously contends that the decision of the Court of Appeals for the Fourth Circuit in not granting a new new trial is directly in conflict with the cases of *FLETCHER v. UNITED STATES*, supra, and *SAN FRATELLO v UNITED STATES*, supra.

This Court's attention is also directed to the recent case of *SMALL v ROBBINS, (DC Me.) 258 F Supp 621, affd (Cal) 371 F 793, cert den 386 US 1033, 18 L ed 2d 594, 87 S ct 1483;* certiorari was denied in the United States Supreme Court in this case on May 8, 1967. The Court of Appeals for the First Circuit held:

"Prosecutor's separate questioning of witness, while holding, and formulating questions from, statement

given by witness to police at time of his arrest, after prosecutor knew or should have known that witness would refuse to answer on valid self-incrimination grounds, was prejudicial to defendant on trial; inferences from witness' refusal to answer added critical weight to prosecution's case in form not subject to cross-examination and prejudice was not curable by cautionary instructions given by trial court; consequently, defendant's conviction was obtained in violation of his rights under confrontation clause of Sixth Amendment." (Quoted from ALR 2d Later Case Service, Vol. 6, Pocket Parts page 301; supplementing ALR 2d 1446.)

Petitioner earnestly contends that the argument of the United States Attorney as set forth on page 202 of the transcript, lines 16 through 25, page 203, lines 1 through 6, and page 205, beginning with line 10 and running through line 24 were highly prejudicial.

The District Attorney argued that the co-conspirator Jimmy Lee Martin would not testify because he would be afraid that if he left his house that his house would be burned and one of his own family would be burned up. The District Attorney also argued at page 205, beginning with line 10 and extending through line 13, that if these defendants, meaning defendants Blackburn and Call, had any defense or anyone who could have aided their cause they were at liberty to call them.

VIERECK v. UNITED STATES, 318 US 236, 248, 63 S Ct 561, 566, 87 L ed 734, 741:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Quoted from 3 ALR 3d 963, 964.)

The holding of the Circuit Court that petitioner was not entitled to a new trial is directly in conflict with the recent case of *WILLIAM A ANDERSON, PETITIONER, v LOUIS S NELSON, WARDEN,* which was filed by the Supreme Court of the United States on April 1, 1968, and reported in *20 L ed 2d 81*. This case distinctly held that the prosecutor's comment on a defendant's failure to testify in his state trial for crime cannot be labeled harmless error where such comment is extensive, and where an inference of guilt from silence is stressed to the jury as a basis for conviction.

GRIFFIN v. CALIFORNIA, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229, reh den 381 US 957, 14 L ed 730, 85 S Ct 1797. In that case it was held:

> "The Fifth Amendment, in its direct application to the federal government, and its bearing on the states by reason of the Fourteenth Amendment, forbids either

comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." (Quoted from 14 L ed 2d 107.)

Petitioner in conclusion contends that the Court of Fourth Circuit did fail to properly consider his appeal inasmuch as it denied his counsel the right of oral argument before arriving at a final determination of the merits of the case of petitioner before said Court.

Rule 19, sub-section (b) of the United States Supreme Court Rules provides:

"* * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner earnestly contends that while he was under a judgment of the District Court of forty (40) months imprisonment and $1,000.00 fine, and after having undergone the expenses incident to an appeal from the United States District Court to the United States Court of Appeals, Fourth Circuit, that his constitutional rights were abridged by the Court of Appeals departing from the accepted and usual course of judicial proceedings which almost without exception sanctions the right of oral argument before an appellate court.

In fact Rule 15 of the Court of Appeals for the Fourth Circuit provides that the appellant or petitioner in this Court shall be entitled to open and conclude the argument of the case, and goes further to limit the argument to two counsel for each party on the argument of a case, and provides that counsel shall be allowed thirty minutes for the argument and no more without special leave of the court.

Counsel for petitioner is without knowledge of such a departure from the accepted and usual course of argument before the Court of Appeals for the Fourth Circuit.

Throughout the years from the very foundation of our country a universal concept of the average man in regard to the courts of law is that he is entitled to a trial by jury, and upon conviction that he is entitled to a consideration of his case by an appellate court. To depart from such course we say is to deprive a defendant of an old and well recognized constitutional right.

Rule 39, sub-section (d) of the Rules of Criminal Procedure in Federal Court provides as follows:

> "Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases."

COPPEDGE v. UNITED STATES, 369 US 438, 8 L ed 2d 21, 82 S Ct 917. The opinion by Chief Justice Warren, at pages 32 and 33, headnotes 24 and 25, truly expresses the

contentions of petitioner that his case was lightly dealt with and ill-considered by the Fourth Circuit Court of Appeals, and we quote from this opinion:

> "In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. The memoranda prepared by counsel in support of petitioner's application for leave to appeal in forma pauperis were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument. In so saying, we need not, and do not, express any opinion on whether petitioner's conviction should ultimately be affirmed or reversed. We only hold that taken as a whole, petitioner's various claims cannot justify the summary disposition of his case ordered below."

Your petitioner respectfully prays that this court grant the petition for writ of certiorari for the reasons as set forth hereinabove.

Respectfully submitted.

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No. 12,402

United States of America,
Appellee,

v.

William Travis Blackburn,
Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro
Edwin M. Stanley, Chief District Judge.

(Decided October 4, 1968.)

Before BRYAN, WINTER and CRAVEN, Circuit Judges.

William H. Murdock for Appellee, and Larry S. Moore for Appellant.

2

PER CURIAM:

The appeal of William Travis Blackburn from his conviction of a conspiracy to violate the Internal Revenue laws relating to distilled spirits, 18 USC 371, presents no grounds justifying a reversal of the judgment of the District Court. The evidence is altogether adequate to establish the guilt of the appellant as a complotter, between May and July 1967 in North Carolina, in offenses involving illicit whiskey. Our consideration of alleged errors of the District Court at trial disclose no basis for these assignments. There is no occasion for argument on the appeal.

Affirmed.

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NOV 9 1968
JOHN F. DAVIS, CLERK

PETITION FOR WRIT OF CERTIORARI

723

IN THE

SUPREME COURT OF THE UNITED STATES

_____term, 1968

No. 12,401

Misc.

Isaac Call,
Petitioner

v.

United States of America,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

s/ Franklin Smith
Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1968

No. 12,401

Misc.

ISAAC CALL,
Petitioner

v.

United States of America,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

The petitioner, Isaac Call, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix I) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered in the Office of the Clerk of said Court of Appeals on October 8, 1968. The jurisdiction of this court is invoked pursuant to Title 28, U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Did the Court commit error in failing to direct a verdict of acquittal at the close of all evidence?

2. Did the Court commit error in failing to set aside the verdict as being contrary to the law and evidence?

3. Were the rights of defendant Call prejudiced by the remarks of the Court as contained in the transcript at page 45 beginning with line 5 and continuing to the bottom of page 46?

4. Were the rights of defendant Call prejudiced by the examination of one Jimmy Lee Martin in the presence of the jury as set forth in page 88 beginning with line 9 and continuing through line 1 on page 90 of the transcript; should the Court by its own motion have declared a mistrial by reason of comment of counsel as contained on page 95 of the transcript beginning on line 8 and running through line 18?

5. Were the rights of defendant Call prejudiced by argument of the United States attorney as set forth on page 202 of the transcript beginning with line 7 and running to the bottom of the page; and also the argument of the United States attorney as set forth on page 205 beginning with line 10 and running through line 23; and did the Court correctly charge the jury as to the right of the defendant Call to testify or not to testify as set forth on page 233 of the transcript beginning with line 1 and running through line 7?

6. Did the Court commit error in allowing the defense attorney to cross-examine the witness, Homer Joyner, in regard to defendant Call being engaged in the illegal whiskey business and prior convictions in the United States District Court for the violation of the Internal Revenue Laws, beginning with the examination of the witness, Homer Joyner, on page 164 and continuing to the middle of page 166 of the transcript?

7. Did the Court commit error in allowing the United States district attorney to cross-examine the witness, Harley Jordan, in regard to prior convictions in the United States District Court of the defendant, Isaac Call, for the violation of Internal Revenue Law, as stated in the transcript beginning in the middle of page 166 and continuing through page 168?

8. Did the Court commit error in allowing the United States attorney to cross-examine the witness, Eugene Sebastian, in regard to sentences previously received by the defendant Isaac Call for violation of the Internal Revenue laws as stated in the transcript at the top of page 169 and continuing through line 5 on page 171?

9. Did the Court commit error in allowing the United States attorney to examine June Call in regard to previous arrests of the defendant Isaac Call as stated in the transcript beginning in the middle of page 171 and continuing to the bottom of page 173?

10. Did the United States Court of Appeals for the Fourth Circuit deprive the petitioner of his constitutional rights in denying oral argument by the Counsel for the petitioner for reaching the merits in the case before the said Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States.

2. The United States Code, section 371.

3. Rule 39, subsection (D), Rules of Federal Criminal Procedure.

4. Rule 19 of the Rules for the Supreme Court of the United States, subsection (B).

5. Rule 15 of the Rules of Practice before the Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

William Travis Blackburn, along with Isaac Call, was indicted in the United States District Court for the Middle District of North Carolina, at Wilkesboro, for a conspiracy during the period from May, 1967, to and including July 26, 1967, alleging that they and others not named in the bill of indictment did conspire to violate the laws of the United States relating to distilled spirits, there being 13 alleged overt acts in said bill of indictment, in violation of 18 U.S.C. 371. A plea of not guilty was entered and a trial by jury was had. At the close of all the evidence, a motion for directed verdict of not guilty was made by the defendant (Record Page 164, line 4; and Page 174, lines 2, 3, 4, 5, 6, and 7), which motions the Court overruled. The case not submitted to the jury and a verdict of guilty was returned. A motion to set the verdict aside was made on behalf of the defendant and the motion was denied. The Court sentenced the defendant Call to the custody of the Attorney General for a period of 54 months and in addition thereto imposed a fine of $2,500.00.

A witness for the Government, John Dale Brooks, named as co-conspirator but not indicted, testified that during the

latter part of May, 1967, Isaac Call, co-defendant, contacted him, John Dale Brooks, at his home in Alleghany County, Middle District of North Carolina, and proposed to furnish equipment and supplies to John Dale Brooks to set up and operate illicit distilleries; and that thereafter, agreement was reached that the defendant, Isaac Call, would furnish stills, sugar, and distilling apparatus and equipment, and that the stills, sugar and distilling apparatus and equipment were later delivered to John Dale Brooks by an unknown third party; and that John Dale Brooks was subsequently contacted by the defendant, William Travis Blackburn. The bill of indictment sets forth that on July 8, 1967, William Travis Blackburn and one Jimmy Lee Martin contacted John Dale Brooks and picked up a load of non tax paid whiskey at the home of John Dale Brooks. There was additional testimony of witnesses on behalf of the United States Government, to the effect that various vehicles bearing illicit spirits were convoyed by the defendant, William Travis Blackburn, although no vehicle at any time being operated by Isaac Call was seized and found to contain illicit whiskey. There was testimony offered by the Government that a 1961 Volvo Sedan was seized and that same contained non tax paid spirits, in the vicinity of Farmington, North Carolina, but no evidence that this particular 1961 Volvo Sedan was loaded with illicit spirits at or near the distillery located in Alleghany County near the home of John Dale Brooks. There was evidence that a 1960 Chevrolet automobile was loaded with whiskey near the home of John Dale Brooks in Alleghany County, and that this same vehicle was seen in the vicinity of Mount Airy, Surry County, North Carolina, but no evidence that the defendant, Isaac Call, was ever near this Chevrolet automobile whenever it was being used to haul and convoy whiskey. There was evidence that an unregistered distillery located near the home of one Andy Brooks in Alleghany County was destroyed by agents of the

Alcohol and Tobacco Tax Division in the latter part of July, 1967. Andy Brooks is the father of John Dale Brooks. Andy Brooks did not testify as a witness and was not named as a co-conspirator in the bill of indictment charging William Travis Blackburn and Isaac Call. There is no evidence in the record that the defendant, Isaac Call, was ever near either the Volvo Sedan or the Chevrolet automobile used to convoy the illicit spirits; and there is no evidence in the record that the defendant, Isaac Call, ever delivered any stills, sugar, or distilling apparatus and equipment to John Dale Brooks at his home or at the home of his father, Andy Brooks, in Alleghany County; and there is no evidence in the record that the third party whom John Dale Brooks testified delivered to him stills, sugar, and distilling apparatus and equipment is known to the defendant, Isaac Call, or was acting on his behalf.

In apt time a notice of appeal was taken to the United States Court of Appeals for the Fourth Circuit and a brief was filed. Subsequently the Counsel for the petitioner was advised that this case was set for argument before the said circuit Court for Friday, October 11, 1968. Subsequent thereto the said Court notified the petitioner through his counsel of record that the case would not be set for oral argument on October 11, 1968, that it would be called on October 9, 1968 and then counsel of record was later notified that the case had been deleted from the calendar and would be rescheduled for argument at a later date; then on October 3, 1968, petitioner was notified through his counsel of record that the Court would not hear oral arguments in the case of your petitioner which was originally scheduled on October 9, 1968, at Richmond, Virginia. That the cases would be decided as submitted on the briefs. That on October 10, 1968, the petitioner was notified through his counsel of record that the

United States Court of Appeals for the Fourth Circuit had affirmed the petitioner's conviction in the District Court for the Middle District of North Carolina.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code, 18 U.S.C. 371, etc. This was the basis for Federal jurisdiction of this case.

AUTHORITIES RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States and other Federal Circuit Courts, and is specifically in conflict with the following decisions:

1. Fletcher v U.S., 118 App DC 137, 332 F2d 724
2. San Fratello, v U. S., (CA5 Fla.) 340 F2d, 560, reh den 343 F2d 711.
3. Small v Robbins, (DC Me.) 258 F Supp 621, affd (CA1) 371 F 793, cert den 386 US 1033, 18 L ed 2d 594, 87 S Ct 1483.
4. Viereck v United States, 318 US 236, 248, 63 S Ct 561, 566, 87 L ed 734, 741.
5. William A. Anderson v. Nelson, Warden, 20 L ed 2d 81.
6. Griffin v California, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229, reh den 381 US 957, 14 L ed 730, 85 S Ct 1797.
7. Stansbury, NC Evidence 104 p. 240.
8. State v. Jones 229 NC 276.
9. State v. McLamb, 235 NC 251

10. Corpus Juris Secundum, Vol. 22A, pp. 706 and 707.
11. Michelson v US, 335 US 469.
12. Campbell v US, 47 Federal 2d, p. 70.
13. People of the State of California v Salvador Perez, 58 Cal. 2d 229, 23 Cal. Rptr 569, 373 P2d 617, 3 ALR 3d 946.
14. Roberson v US 237 F2d 536
15. US v Phillips, 217 F2d 435.
16. State v Becknew, 281 Missouri, 91 Southwestern 892.
17. US v Modern Reed & Rattan Co., 159 F2d 656, 1947.
18. Rule 19, sub-section (b) of the Rules of the Supreme Court of the US.
19. Rule 39, sub-section (d) of the Rules of Criminal Procedure in Federal Court.
20. Coppedge v US, 369 US 438, 8 L ed 2d 21, 82 S Ct 917.

In regard to questions numbers 1 and 2, the defendant Call earnestly contends that the motion for a judgment of non-suit at the close of the Government's evidence should have been granted or the verdict should have been set aside as having been contra to the weight of the evidence against the defendant, Isaac Call, because of the government's witness, John Dale Brooks, testimony that Isaac Call came to his home. There is no evidence that defendant Call ever delivered any stills, sugar or other supplies with which to make whiskey to John Dale Brooks; and there is no evidence in the record that the defendant Call ever assisted in the manufacture or the convoying of any whiskey for the purposes of sale. Therefore, there was no evidence of an overt act having been committed by the defendant Isaac Call or anyone acting in his behalf.

In regard to question number 3, your petitioner earnestly contends that the Court did prejudice the rights of your

petitioner when the Court did admonish the attorney for the defendant Call before the jury as set forth in the transcript at pages 45, lines 11 through 25 and page 46, lines 1 through 8. The Court concluded its admonishment of the attorney for defendant Call by saying, "Are you serious about that." Your petitioner contends that such a reminder by the Court as this record will indicate along with the tone of the language used by the Court would tend to demeanor the defendant Call and his attorney in the eyes of the jury.

As to question number 4, the petitioner contends that it was prejudice of the government to examine prospective witness, Jimmy Lee Martin, as set forth on page 88, 89, and to line 1 on page 90 in the transcript of record as reflected in this testimony, Jimmy Lee Martin was called around to testify on behalf of the government and while in the presence of the jury, he refused to take the stand with the Court insisting on several occasions that the witness come around and take the oath which the witness, Martin, refused to do. Finally, the attorney for the defendant Call and counsel for the defendant Blackburn suggested to the District Attorney that the jury be excused and the Court did finally excuse the jury before continuing the interrogation of the witness and finally holding him in contempt of Court for refusing to testify. This event taking place immediately after the witness, John Dale Brooks, had just left the stand after testifying as stated in the transcript page 59 lines 15 through 24. That the defendant Blackburn allegedly made the statement to Brooks that Jimmy Lee Martin was going with the ATU men, and "I'll get him to come up here to get some whiskey and you can kill him".

FLETCHER v U.S., 118 App DC 137, 332 F2d 724.

> "Calling alleged accomplice of defendant charged with robbery of taxicab driver, and asking him questions which he refused to answer on grounds that answer

might incriminate him, unfairly prejudiced defendant because inferences from refusals to answer added critical weight to prosecution's case in form which was not subject to cross-examination, * * * although trial court instructed jury to draw no inferences of guilt from witness' refusals, it added that witness; exercise of his constitutional right does not mean by itself, of course, that this defendant is guilty, and thus jurors might have understood statement to mean that refusals might be considered along with other evidence as proof of defendant's guilt." (Quoted from ALR 2d Later Case Service, Vol. 6, page 658; supplementing ALR 2d 1443-1456)

SAN FRATELLO, v U. S., (CA5 Fla.) 340 F2d, 560, ren den 343 F2d 711.

This case held that:

"Facts showed prejudicial error in calling defendant's wife as witness so as to require her to claim her privilege against self-incrimination in presence of jury, although she had claimed privilege in previous trial and had advised prosecutor she would assert it in this case. Instruction to jury in connection with matter did not render error harmless." (Quoted from ALR 2d Later Case Service, Vol.6, page 658; supplementing ALR 2d 1443-1456).

The Court will bear in mind that the witness Jimmy Lee Martin is first mentioned in the bill of indictment as a co-conspirator although not named as a defendant in the bill of indictment. The co-conspirator is mentioned repeatedly in the testimony presented by the United States.

Petitioner vigorously contends that the decision of the Court of Appeals for the Fourth Circuit in not granting a new

trial is directly in conflict with the cases of *FLETCHER v UNITED STATES*, supra, and *SAN FRATELLO v UNITED STATES*, supra.

This Court's attention is also directed to the recent case of SMALL v. ROBBINS, (DC Me.) 258 F Supp 621, affd (CAL) 371 F 793, cert den *386 US 1033, 18 L ed 2d 594, 87 S Ct 1483;* certiorari was denied in the United States Supreme Court in this case on May 8, 1967. The Court of Appeals for the First Circuit held:

> "Prosecutor's repeated questioning of witness, while holding, and formulating questions from, statement given by witness to police at time of his arrest, after prosecutor knew or should have known that witness would refuse to answer on valid self-incrimination grounds, was prejudicial to defendant on trial; inferences from witness' refusal to answer added critical weight to prosecution's case in form not subject to cross-examination and prejudice was not curable by cautionary instructions given by trial court; consequently, defendant's conviction was obtained in violation of his rights under confrontation clause of Sixth Amendment." (Quoted from ALR 2d Later Case Service, Vol. 6, Pocket Parts page 301; supplementing ALR 2d 1446.)

As to question number 5, petitioner earnestly contends that the argument of the United States Attorney as set forth on page 202 of the transcript beginning on line 6 and running to the bottom of the page and also the arguments of the United States attorney as set forth on page 205 beginning on line 10 and running through line 23. The district attorney argued that the co-conspirator, Jimmy Lee Martin, did not testify because he would be afraid that if he left his house that his home would be burned down and that his wife and children would be burned up. On page 205 beginning at line

19 and running to the bottom of the page where the governments attorney said, "Now, ladies and gentlemen, as to what defense these two defendants could have had, if there is anyone who could have aided their cause in this matter, they were at liberty to call them."

VIERECK v UNITED STATES, 318 US 236, 248, 63 S Ct 561, 566, 87 L ed 734, 741:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every ligitimate means to bring about a just one." (Quoted from 3 ALR 3d 963, 964.)

The holding of the Circuit Court that petitioner was not entitled to a new trial is directly in conflict with the recent case of *WILLIAM A. ANDERSON, PETITIONER, v. LOUIS S. NELSON, WARDEN,* which was filed by the Supreme Court of the United States on April 1, 1968, and reported in *20 L ed 2d 81.* This case distinctly held that the prosecutor's comment on a defendant's failure to testify in his state trial for crime cannot be labeled harmless error were such comment is extensive, and where an inferences of guilt from silence is stressed to the jury as a basis for conviction.

GRIFFIN v CALIFORNIA, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229, reh den 381 US 957, 14 L ed 730, 85 S Ct 1797. In that case it was held:

> "The Fifth Amendment, in its direct application to the federal government and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be considered by the court or the jury." (Quoted from 14 L ed 2d 107.)

That with the permission of the Court, the petitioner Call would like to argue the questions of 6, 7, 8, and 9 together.

That there was substantial prejudicial error committed by the Court in allowing the prosecuting attorney on cross-examination of the defendant's, Call's, witnesses, Homer Joyner, Harley Jordan, Eugene Sebastian and June Call, pertaining to the convictions of the defendant Call on previous occasions in the United States District Court for the Middle District of North Carolina for violating of the Internal Revenue laws. It is contended that the petitioner Call's reputation and character in the community was never placed before the jury by the witnesses' testifying on behalf of defendant Call. One authority for this is Stansbury, N. C. Evidence 104 at Page 240:

> "The reasons for rejecting evidence of a party's character in a civil case apply with peculiar force to the defendant in a criminal prosecution. Unless the accused

testifies as a witness (thus subjecting himself to impeachment) or produces evidence of his good character to repel the charge of crime, the State may not show his bad character for any purpose whatever.

The defendant, however, is morally entitled to put in evidence any circumstance which tends to lessen the likelihood of his guilt, . . ."

STATE v. JONES, 229 N.C. 276; STATE v. MCLAMB, 235 N. C. 251; Stansbury, Section 108, Subsection 1:

"If the accused has neither testified nor put his character in issue, evidence of his character is not admissible for any purpose."

What is the general character and reputation of the defendant in his community? Without this question or a series of questions designed to illustrate what the defendant's general reputation and character are, the defendant's character is not in issue. Thus, the general rule as stated in Corpus Juris Secundum, Volume 22A, Page 706 and 707:

"The evidence of the commission of other offenses. It follows that if the accused's character is not in issue, the state may not offer evidence of the commission of other offenses reflected on the accused's character. According to the evidence that the accused at a prior time was arrested indicted for, or convicted of another offence or that he has been in the penitentiary or that he associated with other persons of bad character is inadmissible."

Other authorities in support of this argument are MICHELSON v. U. S., 335 U.S. 469. In the petitioner's brief as submitted to the United States Court of Appeals for the

Fourth Circuit, your petitioner relied upon MICHELSON v. U.S., 335 U.S. 469. In the copy of the decision as filed in the office of Samuel W. Phillips, Clerk of the United States Court of Appeals for the Fourth Circuit, October 10, 1968, wherein petitioner's conviction was affirmed in a *per curiam* opinion before Circuit Judges, Bryan, Winter and Craven. The Court said it found no basis for the assignments of errors in the District Court in permitting the cross examination of certain witnesses in Call's defense and found no basis for assignment and cited as their authority MICHELSON v. UNITED STATES, 335 US 469 (1948). The facts in the Michelson case are entirely different from the facts in your petitioner's case. In the Michelson case, the defendant took the stand tc testify in his own behalf and to quote from the decision at page 216 of the United States Supreme Court Reporter,

> "On direct examination of the defendant his own counsel brought out that in 1927, he had been convicted of a misdeamor in trading counterfeit watch dials and that the defendant called five witnesses to testify that he enjoyed a good reputation. Two of them testified that their acquaintance with him extended over a period of about 20 years; others said they had known him at least half that long."

In this case there is no doubt that under the general rules
1 as applied by the Federal Courts that the defendant Michelson placed his character and reputation into issue before the jury prior to the cross examination of the defendant by the government's attorney and the cross examination of the witnesses which were offered to prove his reputation in his community. CAMPBELL v. U.S., 47 Federal 2nd, Page 70,

> "The general rule is that evidence that the accused has committed another crime independent of and unconnected with the one on trial is inadmissible. It is not competent to prove one crime by proving another."

The direct examination of the witness, Homer Joyner, begins on page 164 and line 10 and ends at the bottom of page 165; the cross examination of the same witness begins at the bottom of page 165 and ends on page 166, line 9. The direct and cross examination of the witness, Harley Jordan, offered on behalf of defendant, Isaac Call, begins on page 166, line 18 and ends at the bottom of page 168. On page 168 the government's attorney was allowed to ask the witness, Harley Jordan, "And you didn't know that Isaac Henry Call had been convicted in this Court on five occasions—" next question was, "—four occasions in the last ten years?" As to these questions, defendant Call's objection was overruled by the presiding judge. That your petitioner contends that the examination of these four witnesses by the petitioner's attorney did not place his character and reputation in his community into evidence before the jury. The testimony of these witnesses was offered solely for the consideration of the jury as to whether or not the defendant Call would have the time to carry on in the illegal liquor business, as testified to by the government's witnesses. The petitioner further contends that the questions as asked of the defendant Call's witness, Harley Jordan, as to the defendant's prior convictions was done so in bad faith by the government's attorney. That the government's attorney did not thereafter show evidence of his good faith in the presentation of documentary evidence to show that the defendant Call had in fact been convicted on five previous occasions, four in the last 10 years. Defendant Call's record in the Federal Court in the State of North Carolina as well as any other state in the union will not show that he had been convicted on five occasions previously for the violation of the Internal Revenue Laws. The government in the Michelson case presented after being asked by the

trial Court, out of the presents of the jury as to a prior conviction of stolen goods. Counsel for the government replied that to suppo.t his good faith, he exhibited a proper record of the prior convictions of the defendant Michelson. This was not requested by the trial Court or volunteered by the government's attorney in this case; neither was there ever any instructions by the trial Court to the jury of the limited purpose for which this evidence of prior convictions was to be received. The petitioner Call contends that this was a substantial prejudicial error committed by the trial Court and by the United States Government's prosecuting attorney. Another authority on this point, PEOPLE OF THE STATE OF CALIFORNIA v. SALVADOR PEREZ, 58 Cal. 2d 229, 23 Cal. Rptr 569, 373 P2d 617, 3 ALR 3d 946, in this case, the prosecuting attorney in the State of California was allowed during cross examination of the defense witness asked the witness whether he had been convicted of a felony but failed to introduce documentary proof of prior convictions after the witness answered the question in the negative. Here the Court held that the prosecuting attorney's actions in regard to the cross examination of defense witnesses as to prior convictions was considered misconduct and such misconduct considered with other improper conduct by the prosecuting attorney was prejudicial to the defendant's rights and required a reversal of the judgment. Petitioner contends that when the questions were asked of his witnesses as to prior convictions of the petitioner, that it is not enough to ask the question to invoke the answer but the prosecuting attorney must be prepared to prove by documentary evidence that the defendant in fact had been convicted on five previous occasions. In the case of ROBERSON v. U.S. 237 Federal 2nd 536, a 1956 case in the Fifth Circuit Court of Appeals,

where the prosecution attempted to cross examine the defendant's character witnesses on prior convictions of the accused, the Court did not ascertain out of the presence of the jury that the prosecution was in good faith in doing so and could prove this by record. Also, the prosecution in cross examining the witness used an improper form of questioning whereby he asked the witness, "Did you know that in September of 1938 Herman Roberson was arrested for transporting liquor?" Instead of asking the question in the proper form which would read, "Have you heard." Due to both of these errors, the cross examination of the witness amounted to an improper examination and the Circuit Court of Appeals reversed and remanded the case. The questioning techique of the government's attorney in asking the question is identical to that used by the government's attorney in the cross examination of the witness, Homer Joyner, as reflected at the bottom of page 165 and top of page 166 of the record:

Q Did you know that he had been convicted in the United States District Court for violation of the Internal Revenue laws—

Objection,

Q —on six different occasions?

Objection

In the case of US. v. PHILLIPS, 217 Federal 2nd 435, the prosecution asked the defendant's character witnesses if they had heard whether the defendant had been arrested of certain previous crimes there was no evidence in the case that the government was able to prove such arrests or that the defendant had actually been previously arrested. The trial judge did not take any precautionery measures to protect the defendant from any abuse in these questions. In US v. PHILLIPS at page 443, the Court said,

> "The record is entirely devoid of any showing as to whether the defendant had in fact been arrested, as implied by the questions. Neither does the record disclose by vague inference that the Court was at any time advised that the government was prepared to prove such arrest."

This Court cited as authority MICHELSON vs. U. S., 335 US 469 at page 480. In the Phillips' case, as the case in hand, the trial Court failed to instruct the jury as to the admission of this evidence of the defendant's past record. The Court said in the Phillips' case at page 444,

> "In the first place, it is doubtful if any instruction could have been given at that late time which would have discipated the harmful effect of the cross examination."

In the Phillips' case the conviction of the defendant was reversed and remanded.

Thus it became incumbant upon attorney for petitioner to attempt to rebut this highly prejudicial evidence already received by the jury. The petitioner contends that this placed an unreasonable burden upon the defendant Call. Petitioner Call contends that the use of the word reputation in the direct examination of the witness Eugene Sebastian, did not in any way waive the objections of the question propounded by the government's attorney in cross examination of the witnesses Homer Joyner and Harley Jordan.

In the case of STATE v. BECKNER, 281 Missouri, 91 Southwestern 892, the defendant took the stand in his own behalf and without placing his character into issue he was asked by the prosecutor about the defendant's prior convictions. In order to rebut the erroneous procedure by the prosecutor, the defendant offered witnesses to prove his good

character and reputation in his community. On appeal before the Supreme Court of Missouri, the Court said that defendant's subsequent admission of his good character into evidence did not waive his objections to the prosecutor's prior erroreous questions,

> "Whereas in this case he objected and protested against the admission of the testimony tending to prove that he was a trubulent and violent man, and saved his exceptions to the ruling of the Court, and then to negative and destroy the effect of that evidence improperly admitted, he was driven to the effort to rebut that evidence and prove the contrary. In a word he was compelled over his objections and exception, to meet an issue which was improperly projected into the case."

The Court reversed and remanded the defendant's conviction.

In the case of U.S. v. MODERN REED & RATTAN CO., 159 F2nd 656, 1947, the assistant district attorney made known to the jury at the start of the trial that the defendant had been convicted for prior criminal violations. This was done without objection by the defendant's trial counsel. Later in the trial the defendant did introduce evidence as to his good character. The Court on appeal held that it was erroneous for the assistant District Attorney to have placed before the jury the fact of the defendant's former convictions and the subsequent introduction by the defendants of their own good character into evidence did not cure this error.

> "We shall assume that the government could then have proved the former conviction either to rebut the evidence of good character or to discredit him as a witness. But the difficulty is that, absent the initial error, it is not clear that the defense would have followed this pattern. Unless a defendant in a criminal case puts his

> character in issue or testifies himself neither that nor his credibility can be attacked by the prosecution. . . His freedom of choise as to such issues may not be taken from him by error previously committed in the trial."

As to the question number 10 the petitioner in conclusion contends that the Court of Appeals for the Fourth Circuit did fail to properly consider his appeal inasmuch as it denied his counsel the right of oral argument before arriving at a final determination of the merits of the case of petitioner before said Court.

Rule 19, sub-section (b) of the Rules of the Supreme Court of the United States provides:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of suprevision."

Petitioner earnestly contends that while he was under a a judgment of the District Court of fifty-four (54) months imprisonment and $2,500.00 fine, and after having undergone the expenses incident to an appeal from the United States District Court to the United States Court of Appeals, Fourth Circuit, that his constitutional rights were abridged by the Court of Appeals departing from the accepted and

usual course of judicial proceedings which almost without exception sanctions the right of oral argument before an appellate court.

In fact Rule 15 of the Court of Appeals for the Fourth Circuit provides that the appellant or petitioner in this Court shall be entitled to open and conclude the argument of the case, and goes further to limit the argument to two counsel for each party on the argument of a case, and provides that counsel shall be allowed thirty minutes for the argument and no more without special leave of the Court.

Counsel for petitioner is without knowledge of such a departure from the accepted and usual course of argument before the Court of Appeals for the Fourth Circuit.

Rule 39, sub-section (d), of the Rules of Criminal Procedure in Federal Court provides as follows:

> "Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases."

That your petitioner is at a loss to understand why his case was set for argument before the Fourth Circuit on October 11, 1968, then this date discontinued and reset again for October 9, 1968, and then discontinued again and later notified that the case would be decided upon the brief. Petitioner contends that this is a highly unusual manner in handling cases as important as your petitioner's case is.

COPPEDGE V. UNITED STATES, 369 US 438, 8 L ed 2d 21, 82 S Ct 917. The opinion by Chief Justice Warren, at pages 32 and 33, headnotes 24 and 25, truly expresses the contentions of petitioner that his case was lightly dealt with

and ill-considered by the Fourth Circuit Court of Appeals, and we quote from this opinion.

> "In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. The memoranda prepared by counsel in support of petitioner's application for leave to appeal in forma pauperis were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument. In so saying, we need not, and do not, express any opinion on whether petitioner's conviction should ultimately be affirmed or reversed. We only hold that taken as a whole, petitioner's various claims cannot justify the summary disposition of his case ordered below."

Your petitioner respectfully prays that this court grant the petition for writ of certiorari for the reasons as set forth hereinabove.

Respectfully submitted.

s/ Franklin Smith

Franklin Smith
Attorney for Petitioner
Elkin, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Petition for a Writ of Certiorari to counsel of record for the respondent, The Honorable William Murdock, Esq. United States Attorney, P. O. Box 1858, Greensboro, North Carolina, by depositing the same in a United States Post Office, with first-class postage prepaid, addressed to said counsel of record for the respondent, at the above post office address, furnished by said counsel of record for the respondent.

s/ Franklin Smith
Counsel for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
OCT 10 1968
SAMUEL W. PHILLIPS
CLERK

No. 12,401

United States of America,

Appellee,

versus

Isaac Call,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Wilkesboro. Edwin M. Stanley, Chief District Judge.

Decided October 10, 1968.

Before BRYAN, WINTER and CRAVEN, Circuit Judges.

PER CURIAM:

This appeal of Isaac Call from his conviction of a conspiracy to violate the Internal Revenue laws relating to distilled spirits, 18 USC 371, presents no grounds justifying a reversal of the judgment of the District Court. The evidence is altogether adequate to establish the guilt of the appellant as a complotter, between May and July 1967 in North Carolina, in offenses involving illicit whiskey. We have considered the allegations of errors of the District Court at trial, including Call's allegation that the District Court erred in permitting cross-examination of certain witnesses in regard to prior convictions of Call, and find no basis for these assignments. See Michelson v. United States, 335 US 469 (1948). There is no occasion for argument on the appeal.

Affirmed.

NCR

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CARD 3

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 710

WILLIAM TRAVIS BLACKBURN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 723

ISAAC CALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinions of the court of appeals (No. 710, Pet. App.; No. 723, Pet. App.) are not yet reported.

JURISDICTION

The judgments of the court of appeals in No. 710 and No. 723 were entered on October 4, 1968 and October 10, 1968, respectively. The petition for a writ

of certiorari in No. 710 was filed on November 5, 1968 and is, thus, out of time under Rule 22-2 of the Rules of this Court. The petition for a writ of certiorari in No. 723 was filed on November 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are common to both No. 710 and No. 723:

1. Whether the evidence was sufficient to support the convictions.
2. Whether certain incidents during trial and remarks of government counsel in final argument were prejudicial.
3. Whether the court of appeals violated any right of petitioners' by deciding the appeal on the briefs without oral argument.

Petitioner Call (No. 723) presents the following additional question:

4. Whether it was error for the prosecutor to question character witnesses as to whether they were aware of petitioner Call's prior convictions for dealing in illegal whiskey.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Middle District of North Carolina of conspiring to violate the Internal Revenue laws of the United States relating to distilled spirits (R. I, 5-7; R. II, 239; R. II, 278-279). Petitioner

Blackburn was sentenced to imprisonment for a period of forty months and fined $1000 (R. I, 9; R. II, 279). Petitioner Call was sentenced to imprisonment for fifty-four months and fined $2500 (R. I, 10; R. II, 279). The court of appeals considered petitioners' appeals on the briefs without oral argument and affirmed the convictions.

The evidence at trial showed that in the latter part of May, 1967, petitioner Call visited John Dale Brooks at his home on route 1, Sparta, North Carolina, and had a conversation with Brooks about the establishment of a distilling operation (R. II, 41, 43, 45-46). Subsequently, both petitioners came to the Brooks property to examine the back dirt roads to determine safe routes for transporting whiskey from the proposed still site. On this occasion, Call told Brooks that Blackburn would handle delivery of the distilling equipment and the material for making whiskey (R. II, 47-48, 62). Over the next several weeks, seven stills with related equipment and a large volume of sugar were delivered to Brooks and placed into operation (R. II, 49-53). After the stills had been in operation about two weeks, Blackburn came to Brooks' place and was informed of the production schedule (R. II, 53). Blackburn said he "would send a man to pick it up" (R. II, 53). Thereafter, one Jimmy Martin, picked up a load of whiskey in a two-door foreign car (R. II, 53). On the next occasion, Blackburn accompanied Martin to Brooks' home to pick up the whiskey (R. II, 55-56).[1] Blackburn was

[1] This load of whiskey was returned to Brooks by Martin the next night because it was too weak (R. II, 57). Brooks

also with Martin on the third and last occasion he came to pick up whiskey (R. II, 57-59). That same night Blackburn returned to Brooks' home and told him that Martin had "set us up" and "[w]e can't bother him now, but * * * after the court's over * * * I'll get him to come up here to get some whiskey and you can kill him" (R. II, 59-60).

On the evening of July 13, 1967, Internal Revenue agents, acting on information from Martin, stationed themselves in a position to observe Call rendezvous with Blackburn (driving a Ford Thunderbird) and Martin (driving a black Volvo) at an intersection of a country road from the still site and a main highway. Call joined Blackburn in the Thunderbird (R. II, 97-100, 139). On July 15, 1967, agents received information that a black Volvo bearing a specified license would have a load of whiskey to be delivered in Winston-Salem and would be led by a 1963 Thunderbird bearing a specified license driven by Blackburn (R. II, 114-115, 120-123). From surveillance positions on the highway, agents observed the Thunderbird and Volvo about 4:30 a.m. and gave chase (R. II, 115-116, 123). The Volvo cut off the highway and was abandoned by the time the agents arrived. It contained 121 gallons of nontaxpaid whiskey (R. II, 116-117, 123-124). The Thunderbird was stopped and Blackburn and his wife were found to be the occupants (R. II, 117-118, 123-124).

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made it stronger by adding high proof whiskey and delivered it to Blackburn and Martin at the next pick up (R. II, 58-59).

ARGUMENT

1. The evidence was sufficient to support petitioners' convictions for conspiracy to violate the internal revenue laws. Even assuming defense counsel succeeded in developing minor inconsistencies in Brooks' testimony, resolution of the conflict was for the jury. On appeal, the evidence must be viewed in the light most favorable to the government. See *Glasser* v. *United States*, 315 U.S. 60.

2. Petitioners complain about several incidents during trial involving actions of the court, and remarks of government counsel in final argument.

a. Petitioners contend that they were prejudiced by a colloquy between petitioner Call's counsel and the court concerning an objection to Brooks' testimony about statements made to him by Call in the course of the conspiracy. The court asked Call's counsel the basis for his objection to these statements and if he were serious in objecting on the ground of "hearsay" (R. II, 45). Counsel said he was serious about the objection and probably had some law to support him "in the book here" (R. II, 46). The court overruled the objection without further comment. Neither counsel suggested at trial that the exchange had the slightest prejudicial effect.

b. When Jimmy Lee Martin, the informant in this case, was called as a witness, he refused to be sworn or to take the witness stand (R. II, 88-89). Martin gave no reason for the refusal. After it was clear that Martin would not testify, the court dis-

missed the jury at the request of government counsel (R. II, 90). Outside the presence of the jury, the court summarily held Martin in contempt of court for refusal to take the oath and at least start his testimony (R. II, 90-93). The court instructed the jury that the incident should not be considered by them in any way (R. II, 93-95). When the court asked counsel if there was any objection to the instruction, Blackburn's counsel responded that (R. II, 95).

> Your Honor I can't think of any. I thought it was very fair. Of course, none of us know what effect a matter like that has on the jury. The thing that passes through my mind is whether I should make a motion for my client. But as far as the instructions which the Court gave, just listening to it, I don't think of anything I could add to it.

There was no motion for a mistrial. Call's counsel also had no objection.

The government was obviously surprised at this turn of events involving its main witness since it required an early noon recess to continue with the presentation of its case (R. II, 93). Martin advanced no reason for his refusal to testify. In these circumstances the court was justified in summarily disposing of the contempt. Rule 42, F.R. Crim. P.; *Brown* v. *United States*, 356 U.S. 148. The matter was handled as expeditiously as possible and the jury appropriately instructed, to the satisfaction of counsel, to disregard the incident.

c. Government counsel in closing argument made the following remarks (R. II, 202-203, 205):

And why won't a co-conspirator testify? Ladies and gentlemen, the very fear of God is in them, not only for themselves, ladies and gentlemen, but because if they leave—most of them have wives and children; the house burns down and one of your own family is burned up, who is to say—

MR. MOORE: Your Honor, we object.

MR. SMITH: Your Honor, we object. That's prejudicial.

THE COURT: Objection sustained.

MR. WHITE [government counsel]: I will argue, ladies and gentlemen, that the testimony in this case is that William Travis Blackburn said that, "The Negro set us up. We can't do anything to him before he is tried, but after that I'll send him up again and you kill him." Draw any inference from that you will. Don't take my inference.

* * * *

MR. WHITE: Now, ladies and gentlemen, as to what defense these two defendants could have had, if there is anyone who could have aided their cause in this matter, they were at liberty to call them.

MR. MOORE: Your Honor, we object.

MR. SMITH: We object to this part. It's prejudicial.

THE COURT: Well, what you are talking about, the defendant has no obligation to introduce evidence and the defendant has no obligation to testify, and that is not to be held against him.

MR. SMITH: That's right.

THE COURT: I will instruct the jury on that point.

MR. WHITE: All right, sir.

Petitioners contend that they were prejudiced by this allegedly impermissible argument. However, no objection was or properly could be made to counsel's paraphrasing of Brooks' actual testimony concerning the threat to kill Martin and the suggestion that the jury draw any inference it desired. Counsel may make such legitimate comment on the evidence. See *White* v. *United States*, 394 F. 2d 49 (C.A. 9). The court sustained the objection to general comment on the fears of co-conspirators who testify at trial.

Government counsel's comment that petitioners were free to call witnesses who could aid their defense was not a comment on *their* failure to testify. The trier of fact is free to consider a defendant's failure to offer an innocent explanation of evidence which supports an inference of guilt. See *Wilson* v. *United States*, 162 U.S. 613; *Moore* v. *United States*, 271 F. 2d 564, 568 (C.A. 4). The court here made it clear at the time of the argument that defendants' failure to take the stand could not be held against them (R. II, 205) and so instructed the jury as a part of the formal charge (R. II, 233).

3. The court of appeals affirmed petitioners' convictions on the briefs without oral argument pursuant to Rule 7 of the Rules of the Court of Appeals for the Fourth Circuit (Supplementing the Federal Rules of Appellate Procedure) (No. 710, Pet. App. I).[2] Peti-

[2] The supplemental rules for the Fourth Circuit became effective on July 1, 1968, the same date as the Federal Rules of Appellate Procedure were implemented. Rule 7 provides in pertinent part:

[Footnote continued on page 9]

tioners do not have a constitutional right to "oral argument before an appellate court" (Pet. No. 710, 12-14; Pet. No. 723, 21-23). Nor is the court's action in disposing of the matter unfair. The issues were fully briefed by all parties on a complete record and were readily determinable on the record. The rule of the Fourth Circuit permitting disposition in appropriate cases without oral argument is undoubtedly bottomed on the heavy case load in that court. See *United States* v. *Gregg*, 393 F. 2d 722 (C.A. 4). It is consistent with the present appellate rules.

The prior Criminal Rules provided for dimissal of frivolous appeals on motion without oral argument. See Rule 39(a), F.R. Crim. P. (1966); *United States* v. *Gregg*, 393 F. 2d 722 (C.A. 4). That provision is carried over into Rule 27 of the Federal Rules of Appellate Procedure. See Advisory Committee's Notes, 43 F.R.D. 61, 145, 164. Rule 47 of the Appellate Rules empowers the courts of appeals to make

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[2] [Continued]

(a) In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may, from time to time, designate a panel or panels to review any pending case at any time before argument for assignment or disposition under this rule. * * *

(b) If all of the judges of the panel to which a pending appeal has been referred conclude that the appeal is frivolous and entirely without merit, the appeal will be dismissed, or the judgment affirmed. * * * A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted, before the filing of briefs or before oral argument. * * *

rules governing their practice not inconsistent with the Rules. The practice in the Fourth Circuit to decide appropriate cases on the briefs without oral argument is within the spirit of Rule 34(b) of the Appellate Rules that "the court may terminate the [oral] argument whenever in its judgment further argument is unnecessary." The courts of appeals are not foreclosed from adopting reasonable procedure for handling appeals without oral argument "[i]n the interest of docket control and to expedite the final disposition of pending cases." (See note 2, *supra.*)

4. Petitioner Call contends that the prosecutor wrongfully questioned his four "character" witnesses as to whether they were aware of his four prior convictions for dealing in illegal whiskey (No. 723, Pet. 13-21).[3] However, the substance of the testimony of

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[3] Classification of the witnesses as "character witnesses" was abandoned prior to instructions to the jury (R. II, 211-212).

> THE COURT: Before the United States Attorney started arguing, I asked Mr. Smith how he characterized the testimony that he introduced, would it be character testimony or what, and he said well, it was sort of borderline. I asked him if he wanted an instruction on character evidence, and he preferred so far as his client was concerned to just forget the whole thing of character evidence and talking about criminal records and so forth and leave it at that and give no instructions on any phase of that.
>
> Did I state your position correctly, Mr. Smith?
>
> MR. SMITH: Yes sir.
>
> MR. MOORE: I think it would be better off not to charge on that.
>
> THE COURT: Well, that's what he said he wanted me to do.

the witnesses, including petitioner Call's wife, concerning his legitimate business activities, his standing in the community and his family life was that Call was a prosperous farmer with no time for bootlegging (R. II, 164-173). It was legitimate impeachment to inquire into their knowledge that defendant had actually been convicted of being in the liquor business. See *Michelson* v. *United States*, 335 U.S. 469. As to one witness (Sabastian), defense counsel asked on direct "whether [petitioner Call] has a reputation for dealing with whiskey in his community there or not" (R. II, 170), to which the witness replied, "I don't know of it." The prosecutor was not permitted to inquire further into Sabastian's knowledge of previous convictions (R. II, 170). Petitioner Call's wife, after testifying to his business activities and family life (R. II, 171-172), stated on cross-examination that she could not say that Call had never discussed liquor transactions with her "because he has had four previous arrests" (R. II, 173).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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